

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A53/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE <u>6.2.2020</u> SIGNATURE <u><i>AV Semanya</i></u>	

In the matter between

CASWELL RAOLANE

APPELLANT

And

THE STATE

RESPONDENT

 JUDGMENT

SEMENYA J:

[1] The appellant and his erstwhile co-accused were convicted in Tzaneen regional court on a charge of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA), unlawful possession of a firearm and unlawful possession of ammunition in contravention of sections 3 and 90 of the firearms control Act 60 of 2000 respectively. The appellant was sentenced to 15 years' imprisonment on the robbery charge, 10 years on unlawful possession of ammunition to which he was cautioned and discharged. The sentence of 15 and 10 years' imprisonment were ordered to run concurrently. The appeal is against both conviction and sentence and is with leave of the trial court.

[2] The crisp issues in this appeal are whether the regional court was correct in its evaluation and acceptance of evidence of identification of the appellant by state witnesses and whether such evidence amounted to proof of guilt beyond a reasonable doubt, a standard of proof required in a criminal case. It is the view of the appellant, on the basis of the argument that I shall refer to in this judgment, which the appeal court should find that the regional magistrate erred in that regard and that the conviction and the resultant sentence should be set aside.

[3] A summary of the evidence that led to the conviction of the appellant is that, on the 16 July 2010, two people who were identified by Petrus Ramathoka (Ramathoka) and other state witnesses as the appellant and his erstwhile co-accused, arrived at Ramathoka's tavern at night after other patrons had left as it was closing time. The appellant and his co-accused's suspicious behaviour made Ramathoka to call one David Mohale (Mohale) to the tavern. Ramathoka's brother, Johannes, was outside

the tavern at that stage. The suspicion arose out of the fact that it became apparent to Ramathoka that the appellant and his co-accused were not intending to finish the snooker game that they were playing even when he told them that he wants to close the tavern. Their movements as well as the bag that they were carrying further raised his eyebrows.

[4] At some stage the appellant produced a firearm and pointed it at Ramathoka and Mohale who were next to the counter and ordered them to lie down. The appellant and his co-accused dragged Ramathoka and Mohale to behind the counter, tied their legs and arms and demanded money. Ramathoka told them that the only money available was the one on top of the till. The appellant struck Ramathoka with a firearm and demanded more money. The appellant and his co-accused ransacked the tavern was searched for more money. Ramathoka decided to show them where an amount of R10 000.00 was after the appellant had threatened to kill him. The appellant and his co-accused eventually put Ramathoka, Mohale and Johannes inside refrigerators and left, but not before they had damaged what they referred to as the jukebox. After about one hour thirty minutes, Mohale untied himself, kicked open the fridge and went out. He and Johannes untied Ramathoka and took him out of the fridge. Cigarettes and their phones were missing. The police were called to the scene.

[5] Mohale stated that the appellant and his co-accused were known to him by sight only prior the date of the incident, as he saw them about three times at that tavern. Both he and Ramathoka testified that the appellant and his co-accused used to

come the tavern accompanied by Bongani, his girlfriend Mokgadi, Mable and another lady. The police proceeded to search for Bongani and Mokgadi who, after being found, were arrested when Bongani denied that he knew the appellant and his co-accused. The police summoned him (Mohale) and Ramathoka to the police station few days thereafter where they identified their cell phones which were stolen during the robbery.

[6] Warrant officer Maunatlala testified that he found Bongani at the police station with three ladies after they were arrested. Bongani and the two ladies, Mokgadi and Kedibone, agreed to take the police to a place where the appellant could be found. He, Warrant officer Maunatlala, and other police officers drove to Marenong in three police vehicles. When they had parked at a filling station, the two ladies pointed at the two accused and informed Maunatlala that they are the people he is looking for. The appellant and his co-accused stopped and talked to a taxi driver. Upon seeing Maunatlala and his colleagues, the appellant and his co-accused ran towards a block of flats and into the nearby bush. His co-accused was by then holding a blue and black bag. Maunatlala and his colleagues surrounded them which caused the appellant and his co-accused to jump over the fence. Maunatlala and one Warrant Officer Mashau, fearing that they will outrun them, fired shots and injured the appellant's co-accused on his leg. The appellant jumped over the wall and disappeared into the bush. Other police officers later came with the appellant to the spot where the co-accused had fallen. An ambulance was summoned to take the co-accused to the hospital for treatment.

[7] When the police enquired about the bag, the appellant told them that it was somewhere in the bush. Constable Wrongly Mahlatsa testified that the appellant took him to a place among tall grasses and a donga where a black and blue backpack was eventually found. The bag was opened in the presence of official police photographer. Inside the bag there was adidas jacket, pair of jeans, two cell phone chargers, a knife, dove body lotion, a tooth paste and tooth brush, 8 rounds of ammunition, two magazines, 9 ammunition inside a magazine in Norinco firearm, a 6.35 firearm and R1014.00. the two firearms' serial numbers were obliterated.

[8] Mokgadi Pilusa and Detective Warrant Officer Neverdie Risimati Matwalane of the Dog Unit corroborated Maunatlala about what happened when the appellant was arrested. Matalwane went further to state that he arrested the appellant and took him to the police station and that upon their arrival there the appellant told him that he had handed over three cell phones to a certain person at Boxer Supermarket. He proceeded to Boxer with the appellant where the appellant showed him a person by the name of Matome Lawrance Matlou. Matlou gave him three cell phones which were later identified by the complainants in this matter.

[9] Sergeant Luvuyo Lundi Mlindazwe who is employed as Assistant Forensic Analyst deposed to an affidavit in which she stated that she has done a ballistic test on the firearms which were found by Constable Mahlatsa in a donga and found that they are capable of firing.

[10] The appellant testified in his defence and denied that he was at the scene of the incident on the date of the commission of the offence. He stated that he was at Moganya village in Botlokwa on the 16th and came to Tzaneen on the 17th, the date on which he was arrested. He denied that he has ever been at the Ramathoka's tavern with Bongani before the date of the incident. He stated that he started to know Bongani and his girlfriend Mokgadi after his arrest. He admitted though that he was staying at Phalaborwa and that the police were heading there to search for him when he got arrested.

[11] The issues raised on appeal are that the circumstances under which Ramathoka, Johannes and Mohale found themselves in are such that they could not have had a clear observation of their assailant. Counsel for the appellant based his argument on the case of **S v Charzen & Another 2006 (2) SACR 143 (SCA)** where the appeal court set aside the conviction that came about out of the identifying witness' evidence despite accepting that the witness was an intellect, patently honest and confident. The Supreme Court of Appeal found that his evidence of identification is unreliable more so in that his premises were searched and none of the stolen properties were found. The witness in that case had stated that he made sure that he has a good look at his assailants so that he can assist the police with investigations in case he survives the ordeal.

[12] The facts in Charzen's case are distinguishable from the one before us in that in Ramathoka had sufficient opportunity to observe his attackers, whom he suspected their motives. His evidence is further corroborated by that of Mohale. In addition to

this, the questions put to the appellant during cross examination sums up nicely, the facts upon which doubt with regard to the appellant as the perpetrators of the offence can be excluded. The prosecutor put it to the appellant that Ramathoka and Mohale associated him with Bongani, his girlfriend Mokgadi and another lady. It is for this reason that the first person to be contacted by the police were this Bongani and Mokgadi. It is Mokgadi and the other lady who told the police that the appellant resides at Phalaborwa and who offered to go there with the police in search of him. This happened a few hours after the commission of the offences. In less than 24 hours, the appellant was found at a taxi rank. He and his co-accused fled immediately when they saw the police. Firearms and other items were found in a bag which was in their possession when the police saw them. The evidence is that the perpetrators of the offences were holding a back pack and that they pointed a firearm at the complainant. The cell phones which were stolen during the commission of the offence were retrieved with the assistance of the appellant. This evidence cannot be coincidence.

[13] It is indeed so, as expressed in **R v Shekelele and Another 1953 (1) SA 638 (T)**, **S v Mthethwa 1972 (3) SA 766 (A) at 768 A** and many other cases that followed them, that the evidence of identification must, for various reasons stated in those cases, be approached by the courts with caution. The evidence of identification of the appellant by the identifying witnesses, coupled with collateral evidence of other witness, points to the appellant as one of the persons who robbed the complainants beyond reasonable doubt. The application of caution to their evidence only point in that direction.

[14] The appellant raised a defence of alibi. In **R v Biya 1952 (4) SA 514 (A)** at **521C-D**, cited with approval by the Supreme Court of Appeal in **S v Liebensberg 2005 (2) SACR 355 (SCA)**, it was held that:

"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime".

In this appeal, the totality of the evidence proves that the appellant was at Ramathoka's tavern on the date and time of the commission of the offence and not at Botlokwa as per his testimony.

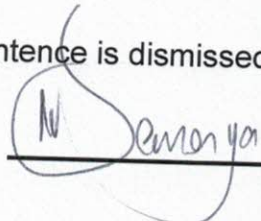
[15] It was held in **S v Hadebe and Others 1997 (2) SACR 641 (SCA)** at **649i-j** that the trial court's primary findings of fact should remain undisturbed unless they are clearly wrong. I find that there is no misdirection on the part of the regional magistrate with regard to her factual findings and, therefore, no reason to disagree with her.

[16] On sentence, it cannot be said that the regional magistrate overestimated the seriousness of the offence. It is indeed so that the use of a firearm during the commission of an offence is an aggravating factor whether or not that firearm was fired. In any event sentencing is the domain of the sentencing court and trite that the powers of the appeal court to interfere with the sentence is very limited. The

essential enquiry is not whether that court was wrong, it is whether the court exercised its discretion judiciously or not. -see **Director of Public Prosecutions, Kwazulu-Natal v P 2016 (1) SACR 243 (SCA)**. It is evident that the appellant and his co-accused meticulously planned the commission of the offence. They waited until everyone else had left. They pretended to be playing a pool table game. They came armed with ropes which they used to tie the victims. As if robbing the victims of their money was not enough, they also damaged their juke box. The circumstances of this case calls for a minimum prescribed sentence in terms of section 51 (2) of Act 105 of 1997. There is no misdirection on the part of the sentencing court in respect of the sentence that it imposed on the appellant and therefore no reason to interfere.

[17] In the circumstances I make the following order:

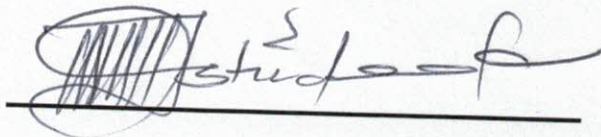
The appeal on conviction and sentence is dismissed.



M.V SEMENYA

JUDGE OF THE HIGH COURT

I agree



T.C TSHIDADA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

ATTORNEYS FOR THE APPELLANT : LEGAL AID SA, POLOKWANE

COUNSEL FOR THE APPELLANT : MR. LM MANZINI.

ATTORNEY FOR THE RESPONDENT : DPP, LIMPOPO

COUNSEL FOR THE RESPONDENT : ADV. JJ JACOBS

RESERVED ON : 08 NOVEMBER 2019

JUDGMENT DELIVERED ON : 06 FEBRUARY 2020